

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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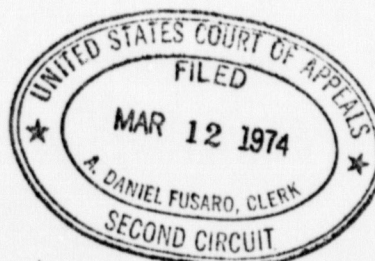
IN THE MATTER	:	
-of-	:	Docket No.
UNISHOPS, INC.,	:	74-1309
Debtor.	:	

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MEMORANDUM OF LAW OF APPELLEE,
ROGERS WHOLESALERS, INC.

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ROGERS WHOLESALERS, INC.

PRELIMINARY STATEMENT

Appellee Rogers Wholesalers, Inc. ("Rogers") submits this Memorandum of Law in response to the application of appellant Unishops, Inc. ("Unishops") for a stay pending the hearing of this appeal and for the granting of an expedited hearing on such appeal. Rogers opposes this motion insofar as it seeks an extension of the limited stay granted by the District Judge, who affirmed the order of the Bankruptcy Judge denying an application of Unishops that sought

to restrain creditors of Unishops' subsidiaries from suing those subsidiaries. As to Rogers, there are no relevant facts in dispute requiring an evidentiary hearing here, and a further general stay would only perpetuate the delays Rogers has heretofore encountered as a result of these proceedings in enforcing its rights on a dishonored check.

FACTS

Rogers is a wholesaler dealing in pharmaceuticals and health and beauty aids. Rogers has for some time supplied merchandise for various stores operated by Nescott, Inc. ("Nescott"), a subsidiary of Unishops.

By mid-November, 1973, Unishops' debt to Rogers for such merchandise had risen over \$30,000. Leonard Schatzberg, Rogers' President, informed Nescott that such debt had to be paid before Rogers would continue sending goods. Rogers subsequently received two checks, one from Nescott in the amount of \$20,000 and one from Unishops in the amount of \$10,455.72. The check issued by Nescott was in fact issued and received on November 29, 1973, one day before Unishops filed a petition for an arrangement under

Chapter XI, § 322 of the Bankruptcy Act. On the basis of having received these checks, Rogers continued to ship merchandise. However, said checks were both dishonored and returned unpaid with the notation "refer to maker." To date, Nescott has not filed a petition for an arrangement under Chapter XI of the Bankruptcy Act.

On December 17, 1973, Rogers commenced an action in New York state court against Nescott on its check. On December 28, 1973, a document entitled "Order to Show Cause with Temporary Restraining Order" (the "Order") was received at the offices of Willkie Farr & Gallagher, attorneys for Rogers. This Order, issued in conjunction with Chapter XI bankruptcy proceedings involving Unishops, temporarily restrained certain creditors of Unishops' subsidiaries from commencing or continuing suits against such subsidiaries. The Order was returnable on December 27, 1973, which date had passed prior to Rogers' receipt of the Order. After several adjournments, a full hearing on Unishops' application took place before Judge Babitt on February 6, 1974. On the same day a hearing was also held on an application by Rogers requesting the Court to modify its Order and to deny Unishops' application so as to permit Rogers to continue with its action against

Nescott on the check. Judge Babitt denied Unishops' application as a matter of law and Rogers' application as being mooted by the decision as to Unishops. Judge Babitt also continued the stay barring suits against subsidiaries pending appeal. Appeals by Unishops and by Rogers were heard before Judge Brieant on February 28, 1974. On March 4, 1974, Judge Brieant affirmed both decisions by Judge Babitt and continued the stay for a limited period of ten additional days.

The instant motion for a further stay pending the hearing of an appeal by Unishops in this Court and for the granting of an expedited hearing herein is returnable on March 13, 1974. After several adjournments, Rogers' motion for summary judgment in lieu of complaint in its action against Nescott is now returnable on March 28, 1974, in New York State Supreme Court, Queens County.

ARGUMENT

THE CONTINUATION OF A STAY HEREIN WOULD
BE HIGHLY PREJUDICIAL TO ROGERS IN BARRING
FURTHER PROGRESS IN ITS ACTION AGAINST
NESCOTT, OVER WHICH ACTION THE BANKRUPTCY
COURT HAS NO JURISDICTION

Unishops' application is based upon the premise
that the persons suing its subsidiaries in state court are

in reality creditors of Unishops itself, and therefore suits against such subsidiaries should be enjoined in light of the bankruptcy proceedings in which Unishops is involved. However, such a premise in no way applies to the facts actually involved in Rogers' action against Nescott, a solvent subsidiary of Unishops. Rogers is suing Nescott on an independent cause of action based upon a negotiable instrument, to wit a printed Nescott check, issued by Nescott to Rogers and subsequently dishonored. Rogers has no cause of action on this check against Unishops. The obligation to make good the check rests upon Nescott alone, and accordingly as to the check Rogers is a creditor of Nescott alone and not of Unishops. Thus, it is evident that there is no basis for the bankruptcy court to restrain Rogers' action.

The above-stated facts clearly show that Unishops has failed to meet a basic requirement for obtaining a stay as requested, i.e., that it make a strong showing that it is likely to succeed on the merits of the appeal. E.g., Bauer v. McLaren, 332 F. Supp. 723, 729 (S.D. Iowa 1971); cf. Eastern Air Lines, Inc. v. C.A.B., 261 F.2d 830 (2d Cir. 1958). Indeed, as the decisions rendered below in this action indicate, the overwhelming authority is contrary to Unishops' contentions on the merits of this action. See, e.g., In Re Beck Industries, Inc., 479 F.2d 410 (2d Cir.), cert. denied,

414 U.S. 858 (1973); In Re Gobel, Inc., 80 F.2d 849 (2d Cir. 1936).

Plaintiffs also fail to meet the additional requirement that they show that the granting of the stay pending appeal will not substantially harm the other parties interested in this action. E.g., Bauer v. McLaren, 332 F. Supp. 723, 729 (S.D. Iowa 1971); cf. Eastern Air Lines, Inc. v. C.A.B. 261 F.2d 830 (2d Cir. 1958). As a result of the bankruptcy proceedings, the appeals therefrom and the stays issued in conjunction therewith, Rogers has been prevented for over two months from pursuing its suit, while Nescott is allowed to pay other creditors. In the absence of any substantial likelihood of success on the merits, the further delay, expense, and harm to Rogers cannot be justified.

CONCLUSION

It is therefore submitted that due to the prejudice to Rogers which any continuation of the stay would cause and due to the failure of appellant to show any like-

likelihood of success, the continuation of the stay sought by this motion should not be granted.

Dated: New York, New York
March 12, 1974

Respectfully submitted,

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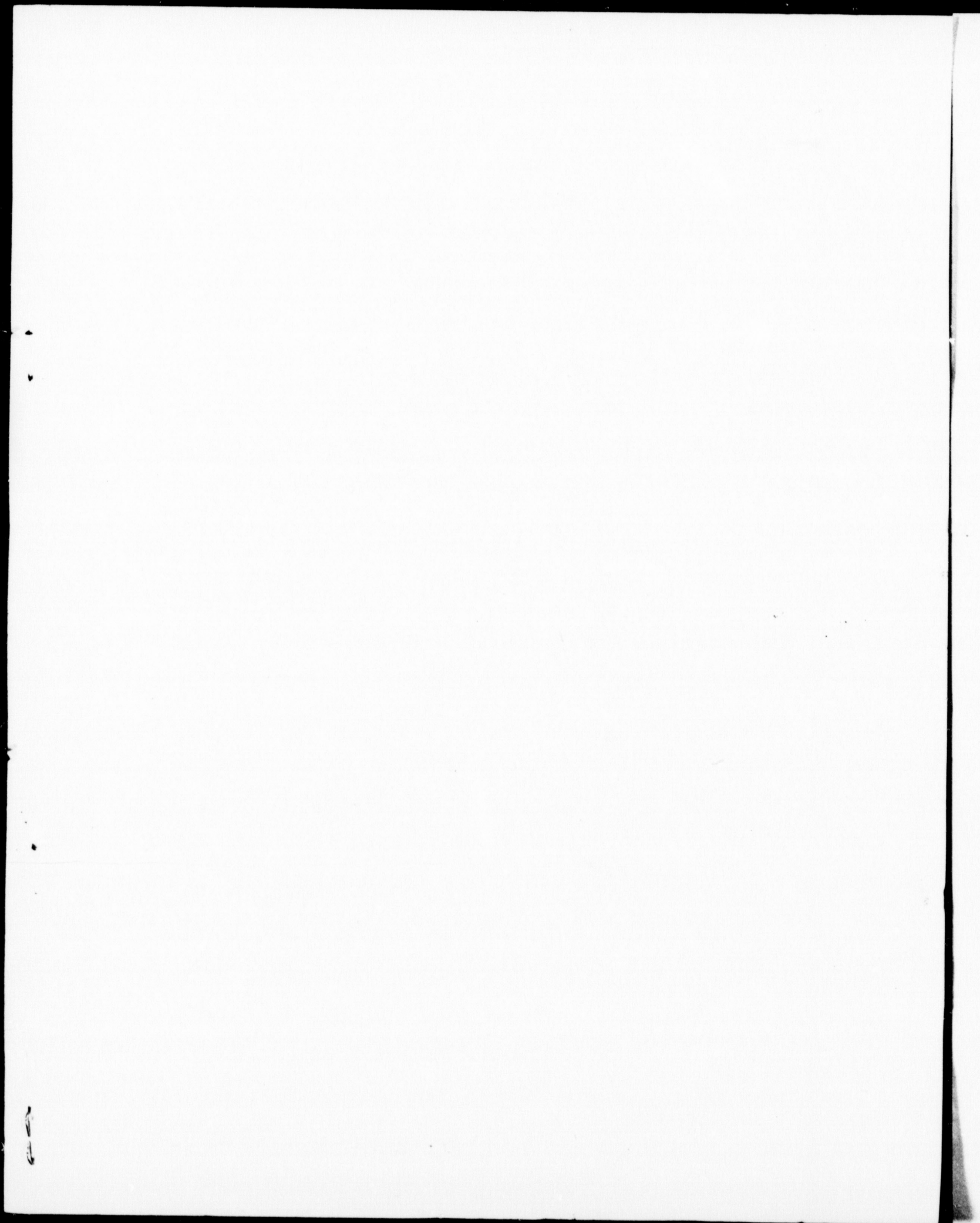
Of Counsel

Certificate of Service

June 11, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

E. Thomas Bayle



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LEVIN & WEINTRAUB
Attorneys for Sector